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# In the Supreme Court of the United States

OCTOBER TERM, 1959

HOLLAND FURNACE COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION

*ON PETITION, AND ON MOTION FOR LEAVE TO FILE PETITION, FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

J. LEE RANKIN,
*Solicitor General,*

ROBERT A. BICKS,
*Acting Assistant Attorney General,*

RICHARD A. SOLOMON,
HENRY GELLER,
*Attorneys,*
*Department of Justice,*
*Washington 25, D. C.*

DANIEL J. MCCAULEY, JR.,
*General Counsel,*

ALAN B. HOBBES,
*Assistant General Counsel,*
*Federal Trade Commission,*
*Washington 25, D. C.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1959

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Nos. 520, 491 Misc.

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HOLLAND FURNACE COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION

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*ON PETITION, AND ON MOTION FOR LEAVE TO FILE PETITION, FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. 17-33) is reported at 269 F. 2d 203. The opinion of the Federal Trade Commission (App. 59-65)[1] has not yet been reported.

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[1] "App." refers to petitioner's appendix in the court below.

## JURISDICTION

The interlocutory order of the court of appeals which petitioner seeks to review was entered on June 16, 1959 (Pet. 35), and a petition for rehearing was denied on August 14, 1959 (Pet. 36). In No. 520, the petition for a writ of certiorari was filed on November 10, 1959; the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). In No. 491 Misc., the motion for leave to file petition for an extraordinary writ of certiorari was filed on November 19, 1959; the jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

## QUESTION PRESENTED

Whether the court of appeals correctly held that, on the particular facts of this case, certain competitive practices of petitioner, found by the Federal Trade Commission to be unfair, were "in commerce" within the coverage of Section 5 of the Federal Trade Commission Act.

## STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 52 Stat. 111, 66 Stat. 632, 15 U.S.C. 45, provides in part as follows:

> Section 5 (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * *

Section 4 of the same Act, as amended, 15 U.S.C. 44, provides in pertinent part:

* * *

> 'Commerce' means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

* * *

## STATEMENT

Petitioner manufactures furnaces, heating equipment, and parts therefor at its factory in Holland, Michigan (App. 60). It sells these products directly to members of the public in their homes, through its 475 branch offices (and connecting warehouses) in 45 states (*ibid.*). Its salesmen or house-to-house canvassers work in territories assigned to them by petitioner under terms of employment fixed by contract with petitioner (App. 61). All sales contracts procured by these salesmen must be submitted to the home office for approval, the customer being expressly informed that the contract "is subject to acceptance by the General Office of the Seller at Holland, Michigan" (App. 15, 61). Salesmen may accept partial or full payment or submit a contract to petitioner for approval of extending credit (App. 77); payments on such a contract may be made "at the Seller's General Office" or at a branch office designated in the contract (App. 15).

Petitioner does not ship furnaces as units but sends carloads of esential parts to central or branch warehouses (App. 60, 72-73). After a sale, the product sold is delivered to the customer's home from the nearest

branch office or warehouse, and installed (App. 73, 77). These warehouses or branches are usually in the same states as the place of sale, but in numerous instances delivery was made from a branch or warehouse in a neighboring state (App. 61). When a sale involves equipment which is not in stock in a branch office, the equipment is ordered directly from the factory (App. 73).

*The Commission proceedings.* The Commission issued a complaint in 1954 charging that petitioner had engaged in unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act (App. 5). After full administrative proceedings, the Commission, adopting the initial decision of the examiner (App. 65-114), found that the charges of the complaint had been established,[2] and issued a cease and desist order (App. 58). The Commission rejected petitioner's argument that its sales from the branch offices "are removed from the flow of interstate commerce" (App. 60). It stated (*ibid.*) that a "realistic view of [petitioner's] activities in moving its products from Michigan across state lines [is that it is] to ac-

[2] The Commission found that petitioner's illegal actions, which were "part of a systematic sales plan effectuated by means of false representations" (App. 59), include "a sales scheme * * * whereby its salesmen gain access to homes by misrepresenting themselves as official 'inspectors' and 'heating engineers' and thereafter dismantling furnaces on the pretext that this is necessary to determine the extent of necessary repairs" (App. 59, 84-86); the use of coercive and "scare tactics" (App. 59, 77-83); representing that salesmen with no engineering training are "engineers" (App. 88-92); refusing to reassemble dismantled furnaces upon the false pretext that they are defective and dangerous (App. 92-97); and refusing to reassemble such dismantled furnaces except upon the owner's execution of a release of petitioner and its employees from liability (App. 97-98).

complish its stated purpose of direct sales to ultimate consumers through '500 Direct Factory Branches * * *,'" and it specifically held (App. 61) that

> Contracts between respondent and branch managers and salesmen; correspondence between the home office in Michigan and field personnel; those contracts between respondent's salesmen and the purchasing public on respondent's behalf which must be accepted by the home office; and representations made by salesmen in selling respondent's products—all are part and indicate a pattern of conduct in commerce within the meaning of the Federal Trade Commission Act.

*The court of appeals proceedings.* After filing its petition for review, petitioner, pursuant to Rule 15(f) of the rules of the court below, moved for determination of the "commerce" issue in advance of the hearing on the merits. The court granted the motion (Pet. 34) and, after briefing and oral argument of that issue, upheld the Commission (Pet. 35). Pointing out that "each case must be ruled by its own particular facts" (Pet. 33), the court rejected petitioner's "claim that all of its sales, distribution and installations are made within any given state subsequent to the time when its products have come to rest in its warehouse or warehouses in such state and are no longer in interstate commerce" (Pet. 26). It stated (Pet. 28) that "the sales, deliveries and installations made by Holland's salesmen and servicemen from its own warehouses * * * are an essential part of Holland's vast interstate business"; and that "the temporary warehousing of the products in each separate state in Holland's own warehouses is but an incident in its interstate business."

## ARGUMENT

Petitioner seeks direct review of an interlocutory determination by the court of appeals that, on the "particular facts" here found by the Commission, the agency correctly ruled that petitioner's unfair and deceptive acts and practices were "in [interstate] commerce." This ruling, we submit, was correct; in any event its correctness presents no issue warranting review at this preliminary stage of the proceedings, when the court of appeals has not yet determined the validity of the Commission's order.[3]

1. Contrary to petitioner's contention (Pet. 8-9), the decision below is not in conflict with *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349, and the court below did not, as petitioner states (Pet. 9), extend "the Commission's jurisdiction * * * to matters which are not *in* commerce, but which merely *affect* commerce" (emphasis in original). The court expressly recognized that *Bunte* precludes the application of the statute to wholly intrastate practices which merely affect interstate commerce (Pet. 25, 28), but held "as did the Commission that the acts, representations and conduct of Holland's employees in selling and distributing Holland's furnaces and parts

[3] In addition to seeking certiorari (No. 520), petitioner also seeks leave to file a petition for an extraordinary writ of certiorari (No. 491 Misc.). Since both petitions are, except for the jurisdictional allegations, identical, our arguments against review are equally applicable to both cases. The petition for leave to seek the extraordinary writ suffers from the further infirmity that petitioner has failed completely to show that this case is one of those "really extraordinary causes" for which such "drastic and extraordinary remedies" are reserved (*Ex parte Fahey*, 332 U.S. 258, 259-260). See *infra*, pp. 9-10.

whether before or after such products had been warehoused in the state where sold and distributed, were in commerce within the meaning of the * * * Act" (Pet. 26-27).[4]

The court ruled (Pet. 27) that the Commission had correctly relied on the contracts between petitioner and its salesmen; the contracts between the salesmen and the public which must be submitted to and approved by petitioner (see p. 3, *supra*; *cf. Hump Hairpin Co.* v. *Emmerson*, 258 U.S. 290, 293-294), correspondence between the home office and the salesmen, and petitioner's own assertion in a report to its stockholders that

> * * * The public cannot buy heating equipment direct from any other factory—only from dealers who sell under their own names. Our branch system throws the complete responsibility for all the actions of its personnel, as well as the functioning of its equipment, directly upon the company. * * *.

The Commission further found that petitioner knew of, and indeed participated in, these improper sales schemes (App. 77-83, 84-88, 90, 95-97), and handled complaints about them from its home office in Holland, Michigan (App. 85-86).

These findings, which petitioner does not challenge, clearly sustain the Commission's determination that

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[4] The court below also pointed out (Pet. 26) that petitioner's claims are refuted, at least in part, by the Commission findings that sales were made across state lines and within the District of Columbia (App. 61, 111). The court further held that whether these findings are sufficient to sustain the Commission's cease-and-desist order involves a consideration of the merits, and it postponed deciding that question until the merits are reached (Pet. 26).

petitioner is engaged on a nationwide basis in direct sales to the public, and that its local sales activities are, therefore, "in commerce." *Binderup* v. *Pathe Exchange, Inc.*, 263 U.S. 291; *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231; *DeLoache* v. *Crowley's, Inc.*, 128 F. 2d 378 (C.A. 5). "[T]he circumstance that in the course of the process the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the [consumer] in the same State, [does not] put an end to the interstate character of the transaction and transform it into one purely intrastate * * *. [T]he movement of the commodity * * * was merely halted as a convenient step in the process of getting it to its final destination." *Binderup* case, *supra*, p. 309.[5]

Petitioner's attempt to isolate its final sale to the consumer from its integrated interstate operations is, as the court below held (Pet. 32), "a technical legal conception" of "commerce among the States," not the "practical one, drawn from the course of business," which this Court has stressed as controlling. *Swift & Co.* v. *United States*, 196 U.S. 375, 398; see also *Stafford* v. *Wallace*, 258 U.S. 495, 518-519. Moreover, it

[5] Petitioner's reliance (Pet. 10) on the Fair Labor Standard Act cases (*Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564 and *Higgins* v. *Carr Bros. Co.*, 317 U.S. 572) is misplaced. In those cases, in which the Fair Labor Standard Act was held inapplicable to certain local activities because the "interstate commerce ceased on delivery to a local distributor" (*Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 238, n. 6), the local distributors were independent dealers, not employees of the interstate seller; and their local distribution of the products was therefore not a part of the interstate business. In the instant case, however, the "local distributors" are employees of petitioner, and their local distribution to the ultimate consumer is, as the court below held (Pet. 28), "an essential part of Holland's vast interstate business."

is well settled that the unfair competitive methods that the Act condemns need not themselves be in interstate commerce, as long as they further an interstate business that competes with other businesses. See *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483; *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U.S. 304. Petitioner is clearly conducting an interstate business, with shipments, agreements with salesmen, sales contracts with customers, payments, instructions to branch offices, etc., all flowing across state lines. See *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, 541. That business is in competition with others "engaged in the manufacture, sale and distribution of furnaces, heating equipment, and parts therefor" (App. 76). Plainly, petitioner's competitive position is furthered or promoted by the deceptive practices it employs in its sales to consumers. It follows that such practices are unfair methods of competition in commerce prohibited by the statute. See *Ford Motor Company* v. *Federal Trade Commission*, 120 F. 2d 175 (C.A. 6), certiorari denied, 314 U.S. 668; *cf. General Motors Corp.* v. *Federal Trade Commission*, 114 F. 2d 33 (C.A. 2), certiorari denied, 312 U.S. 682.

2. Even were the merits less clear than we believe them to be, there would still be no occasion for review at this preliminary stage of the proceedings. Petitioner admittedly is seeking review of an interlocutory ruling, which merely resolved a preliminary issue before the validity of the Commission's order has been determined. If the court below ultimately upholds the order, the "commerce" ruling may be fully reviewed in connection with any review that may be had of the final order. The arguments

which petitioner makes (Pet. 14) to justify review at this preliminary stage—the alleged importance of the ruling (but see pp. 6-9, *supra*) and the avoidance of claimed hardship in now litigating the merits—are merely the usual grounds for seeking review of interlocutory orders. They are no more persuasive here than in the numerous other cases in which this Court repeatedly has refused to review such orders.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in No. 520, and the motion for leave to file petition for a writ of certiorari in No. 491 Misc., should be denied.

J. Lee Rankin,
*Solicitor General.*

Robert A. Bicks,
*Acting Assistant Attorney General.*

Richard A. Solomon,
Henry Geller,
*Attorneys.*

Daniel J. McCauley, Jr.,
*General Counsel.*

Alan B. Hobbes,
*Assistant General Counsel*
*Federal Trade Commission.*

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